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IN THE

Supreme Court of the United States

October Term, 1969

No. 957

EUGENIO HERNANDEZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Eugenio Hernandez respectfully prays that a Writ of Certiorari issue to review a judgment of the Court of Appeals of the State of New York entered on July 2, 1969, affirming a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, rendered on June 27, 1968, which had affirmed a judgment of the Supreme Court of the State of New York, New York County, rendered on March 13, 1967, convicting petitioner of conspiracy to sell a narcotic drug and possession of narcotics with intent to sell, and sentencing him to a prison term of five to eight years.

Opinions Below

The opinion of the Appellate Division (under the name *People* v. *Guerra, Rodriguez and Hernandez*) is reported in 30 A. D. 2d 659, 291 N. Y. S. 2d 580. The memorandum of

the Court of Appeals is reported in 25 N. Y. 2d 869 (official advance sheets of October 1, 1969). Both of the foregoing are hereto appended, and the judgment of the Court of Appeals has been transmitted by Court order, upon information and belief.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed herein was entered on July 2, 1969. On October 1, 1969, Mr. Justice Harlan signed an order extending the time for filing a petition for Writ of Certiorari in this cause to and including November 28, 1969.

The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1257.

Question Presented for Review

In a case where it is found and determined that the alleged admissions of petitioner's co-defendants have been improperly received in evidence by reason if failure to give the constitutional warnings, and those admissions are highly prejudicial to petitioner, should the conviction of petitioner procured thereby be permitted to stand?

Constitutional Provisions

Petitioner urges that the judgment sought to be reviewed is violative of his rights under the Fifth (self-incrimination), Sixth (Confrontation) and Fourteenth (due process) Amendments of the Constitution of the United States.

Statement of Case

At the outset it may be pointed out that the entire prosecution is the product of a manifest entrapment. The chief

witness for the prosecution was one George Bermudez, a police detective acting in an undercover capacity for the Narcotics Bureau (140-141; numerical references indicates pages of the trial transcript). Petitioner herein was tried simultaneously with two co-defendants, namely, Rodriguez and Guerra. Bermudez (according to his testimony) approached Rodriguez and stated he was interested in buying a large quantity of marijuana (146-147). Rodriguez later introduced him to Guerra, whereupon there were discussions and negotiations which included one Castellanos (also a defendant, who obtained a severance), resulting in an agreement to purchase (153-158). Later Rodriguez and Guerra delivered sixteen pounds of cannabis, (another name for marijuana), and Bermudez, paid Rodriguez $1,600 (163-164). On a given signal three other detectives appeared on the scene (166-170) and placed Rodriguez, Guerra and Castellanos under arrest. They also pretended to arrest Bermudez so that the latter might continue to attempt to procure further evidence (166). It is noteworthy that up to this stage of events petitioner was in no manner implicated.

The next episode represents an attempt by Bermudez to involve the co-defendants actually under arrest in a bribery scheme. He pretended that he had a license to maintain a bar and could not afford to get into trouble with the State Liquor Authority; therefore, as he testified, "I told both of them [Rodriguez and Guerra] that I was going to buy myself out" (172). Accordingly, in their presence he offered one of the officers (Watson) a bribe, and the figure of $4,000 was finally agreed upon (173-176). Bermudez handed Watson $2,400 on account, and now we come to the first significant reference to petitioner. In order to raise the rest of the "bribe," Guerra said (178):

"Let's go see the boss."

The "boss" was promptly identified as petitioner (179). Bermudez then testified that petitioner thanked him and

promised to take care of him "as soon as possible with twenty-five pounds" (181). Other erroneous references to petitioner as the "boss" will be indicated in the argument, below.

At various stages of the trial and subsequent proceedings, objections were duly raised for the benefit of all defendants to the reception in evidence of the admissions of any of them on the occasions referred to above. Thus petitioner himself argued against the consideration of any statements imputed to him in advance of proper warning (210-215), while a like motion to exclude admissions of the co-defendants was denied (487-493, 499). An incidental but closely related motion attacked unsuccessfully the introduction of proof of attempted bribery (494-495; sentence, pp. 5-6, 8). All of the foregoing matters were argued at length in petitioner's briefs on the successive appeals to the Appellate Division and the Court of Appeals. As will be further explained below, the raising of the constitutional question was recognized by the Court of Appeals in its memorandum.

Reasons for Allowance of Writ

As suggested above in the question presented for review, petitioner's basic contention is as follows:

Since it has been adjudged by the courts below that the alleged admissions of petitioner's co-defendants have been improperly received in evidence by reason of failure to give the constitutional warnings, and those admissions are highly prejudicial to petitioner, his conviction, obviously predicated thereon, should not be permitted to stand.

To begin with, the Appellate Division reversed the convictions of codefendants Rodriguez and Guerra because they were not given "the warnings enjoined by *Miranda* v. *Arizona*, 384 U. S. 436."

This holding was mentioned in the Court of Appeals memorandum, which continues:

> "In the Court of Appeals defendant Hernandez argued that his constitutional rights were violated by the denial of motions made by him for a severance and by the introduction as against him of statements which were made to Bermudez by Guerra and Rodriguez in his absence and after their arrest and the alleged 'arrest' of Bermudez, and in which he was named as the alleged 'boss' of the enterprise to sell narcotics."

We cannot too strongly emphasize how repeatedly the prosecution utilized this characterization of petitioner as the "boss" in the zeal to procure and sustain his conviction. This becomes even more significant when it is observed that petitioner was the only defendant who testified, that he denied any complicity and that he had no previous criminal record. Twice Bermudez quoted co-defendant Guerra (after arrest) as saying, "Let's go see the boss" (178). The prosecutor regarded it as important enough to quote verbatim both in his opening address to the jury (103) and in his summation (619), the latter reference being as follows:

> ". . . Do you recall what Guerra said? 'Let's go see the boss.' . . . . And I submit they go to see the boss, Eugene Hernandez. He is the boss. He is the contact that Guerra had to see before he could deliver drugs . . ."

Again (623):

> "Guerra told you why. 'This man is the boss.' Before any deal was transacted, Guerra had to speak to Hernandez."

Small wonder, men, that in the charge to the jury, in a concise review of the evidence, we find this language (654):

> "Guerra said, 'Let's go see the boss.' . . . That man was Hernandez."

Nor is this all. The District Attorney's brief in the Court of Appeals (after the Appellate Division had ruled Guerra's statement inadmissible, at least against him) constantly utilized the epithet, writing with reference to petitioner: "Let's go see the boss;" "we must report at once to the boss;" "let's see the boss;" "Hernandez *showed instant recognition and response* as the boss of the operation" (italics in original); "Hernandez who showed himself to be the man-behind-the-scenes" (resp. brief, pp. 6, 12, 15).

All of the foregoing references necessarily had their impact upon the Court of Appeals, which in its terse memorandum noted that petitioner's constitutional arguments attacked the admissibility of statements of others naming him "as the alleged 'boss' of the enterprise."

If the admissions could not constitute evidence against the codefendants and should never have been received, what possible justification can there be for upholding their availability against petitioner? If the case against all three were now being tried again with the benefit of the Appellate Division's ruling, could the people conceivably urge that the admissions by the others should be received as being pertinent to petitioner? Yet it is impossible to conclude that the denomination of petitioner as "boss" was not grossly prejudicial. Certainly the prosecutor, the trial Court and the Court of Appeals all regarded it as playing a cogent if not conclusive part.

The evidence may not be approved under the rule of declarations of a coconspirator during the pendency of

the conspiracy. It must be remembered that Rodriguez and Guerra were already under arrest on the narcotics charges, so that the conspiracy, if any, was at an end. The situation must not be confused with any claim of conspiracy to commit bribery, for the indictment contains no such accusation.

This Court, in *Bruton* v. *United States,* 391 U. S. 123, reversed a conviction where a defendant was denied the right of confrontation of a codefendant who had made pre-trial statements incriminating the appellant but did not testify on the trial. Moreover, it is well established in the line of cases including *Fiswick* v. *United States,* 329 U. S. 211; *Krulewitch* v. *United States,* 336 U. S. 440 and *Wong Sun* v. *United States,* 371 U. S. 471. That declaration of a coconspirator after the termination of the conspiracy are inadmissible.

It may be pointed out that in anticipation of the difficulty, petitioner had duly moved for a severance, but his applications therefor were denied (124, 135-136).

Conclusion

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the Court of Appeals of the State of New York, to the end that this cause may be reviewed and determined by this Court; that the judgment of the said Court of Appeals may be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated New York, N. Y., November 25, 1967.

Respectfully submitted,

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Attorney for Petitioner.

JACOB W. FRIEDMAN,
Of Counsel.

Opinion of the Appellate Division

The People of The State of New York, Respondent, v. Emilio Guerra, Alfredo Rodriguez and Eugenio Hernandez, Appellants.—Judgements of conviction of Emilio Guerra and Alfredo Rodriguez unanimously reversed, on the law, and a new trial of said defendants ordered. Judgment of conviction of defendant Eugenio Hernandez unanimously affirmed. The self-incriminating statements by Guerra and Rodriguez, to which Detective Bermudez testified, should have been excluded. These two defendants were given neither the notice prescribed by section 813-f of the Code of Criminal Procedure, nor, when arrested, the warnings enjoined by *Miranda* v. *Arizona* (384 U. S. 436). The People imply that the requirements were waived by the assertedly irregular manner of taking objection to the testimony. There was not a complete failure to object (cf. *People* v. *Ross,* 21 N. Y. 2d 258, 262), and although it may be that the objection could have been voiced earlier, there is no indication that unfair tactical design prompted whatever delay occurred. In our opinion it would be unjust in the case before us to allow its outcome to turn on the degree of alertness of counsel. We find without basis, also, the suggestion that the *Miranda* warnings may be dispensed with if admissions after arrest are elicited by deception and not by open questioning (cf. *Massiah* v. *United States,* 377 U. S. 201). *People* v. *McQueen* (18 N. Y. 2d 337, 346), cited in support of the suggestion, was a case to which *Miranda* was expressly held inapplicable, and a statement in the opinion on which the People rely must be read in that context. Accordingly, defendants Guerra and Rodriguez should be granted a new trial. In the circumstances, it is unnecessary to discuss other points raised by them or by the People with respect to them. The clear case against Hernandez is not

vulnerable to the arguments available to his codefendants. He had been given notice pursuant to section 813-f, and in the pretrial hearing which followed it was determined that his statements to Detective Bermudez were voluntarily made. Furthermore, they were made long before he was taken into custody. Concur—Botein, P. J., Capozzoli, Tilzer, McGivern and McNally, JJ.

Opinion of the Court of Appeals

The People of the State of New York, Respondent, v. Eugenio Hernandez, Appellant.

Appeal, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 27, 1968, affirming a judgment of the Supreme Court (Postel, J.), rendered in New York County upon a trial which convicted defendant, one Emilio Guerra and one Alfredo Rodriguez of the crimes of feloniously possessing a narcotic drug with intent to sell, and conspiracy, as a felony. The indictment charged that they unlawfully possessed cannabis on or about April 5, 1965 and, for a period prior thereto, had offered to sell it to one George Bermudez. The convictions of Guerra and Rodriguez were reversed by the Appellate Division, which ordered a new trial as to them because they had not given the required notice and warnings before they made certain self incriminating statements, testified to by Bermudez, a police officer (see 30 A. D. 2d 659). In the Court of Appeals defendant Hernandez argued that his constitutional rights were violated by the denial of motions made by him for a severance and by the introduction as against

him of statements which were made to Bermudez by Guerra and Rodriguez in his absence and after their arrest and the alleged "arrest" of Bermudez, and in which he was named as the alleged "boss" of the enterprise to sell narcotics. The People argued that the conspiracy had not ended at the time the statements were made and that they were admissible as against defendant Hernandez as statements made by conspirators concerning an absent conspirator, while the conspiracy was continuing and in furtherance of it. Judgement affirmed; no opinion. All concur.